POLEON AJAN

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[CRIMINAL APPEAL NO: 41-86-2009-II]
4 DECEMBER 2009

ROAD TRAFFIC: *Charge - Duplicity - Defective charge - Section 41(1) Road Transport Act 1987 - Causing death by reckless or dangerous driving - Two distinct offences under same section - Dangerous driving - Reckless driving - Prosecution combining reckless driving and dangerous driving under one charge - Whether prejudicial and unfair to accused - Whether error fatal - Whether proper for appellate court to substitute with conviction under s. 43(1)*

ROAD TRAFFIC: *Evidence - Causing death by reckless or dangerous driving - Section 41(1) Road Transport Act 1987 - Absence of rough sketch plan - Neat sketch plan, whether can be primary evidence - Scratch marks, scattered glass fragments and brake marks as indicators of point of impact*

ROAD TRAFFIC: *Driving without due care and attention - Careless and inconsiderate driving - Section 43(1) Road Transport Act 1987 - Power of court to convict driver charged with causing death by reckless or dangerous driving under s. 43(1) - Evidence*

The appellant was charged in the Magistrate's Court for causing death by reckless or dangerous driving under s. 41(1) Road Transport Act 1987 ('RTA'). He was found guilty, convicted and sentenced to 30 months' imprisonment, fined RM5,000 and disqualified from holding a driving licence for three years from the date of his conviction.

On appeal before the High Court herein, the appellant attacked his conviction, primarily, on the ground that the charge was bad for duplicity as the prosecution had wrongly framed it against him by integrating the two distinct offences embodied in s. 41(1) RTA, *ie*, 'dangerous driving' and 'reckless driving'. It was also contended, *inter alia*, that: (i) the prosecution's failure to tender the rough sketch plan had rendered the neat sketch plan and its key inadmissible; (iii) the presence of scratch marks and scattered glass fragments were not sufficiently indicative of the point of impact; (iv) undue weight had been given to the brake marks which were on the

road shoulder; and (v) the victim's position in the middle of the road (before the collision) and the evidence of PW2 that the point of impact was in the middle of the road - was not given proper weight.

Held (allowing the appeal):

(1) Two distinct categories of offences are embodied within s. 41(1) RTA, namely, causing death by dangerous driving and causing death by reckless driving. Dangerous driving covers a situation where the accident arose as a result of momentary inattention, misjudgment or inadvertence. Reckless driving, which is more serious, arises where the driver has driven in such a manner as to show a selfish disregard or recklessness for the safety of other road users. Section 41(1) RTA provides for two separate offences which attract the same punishment. The ingredients for causing death by reckless driving are different from those that constitute causing death by dangerous driving. (para 5)

(1a) The prosecution had committed a fatal error in combining the two distinct offences in s. 41(1) RTA together under one charge. The error was inexcusable. It was prejudicial and unfair to the appellant as he would have been burdened with having to disprove two separate sets of ingredients for the offences. On this ground alone, the appeal should succeed. (para 6)

(2) The neat sketch plan was a piece of primary evidence in its own right. The absence of the rough sketch plan merely went to the weight of the document tendered and not it's admissibility. In road accident cases, the presence of scratch marks, scattered glass fragments and brake marks are good indicators as to the point of impact, subject to any logical and reasonable explanation to the contrary. The victim's position in the middle of the road at the material time was not one that was illegal as he was attempting to turn right. (paras 7, 8 & 10)

(3) Although the charge against the appellant under s. 41(1) RTA was bad for duplicity, there was overwhelming evidence to constitute an offence for driving without due care and attention under s. 43(1) RTA. (para 14)

[Appeal allowed; conviction under s. 43(1) RTA entered instead; appellant fined RM10,000 in default six months' imprisonment; conviction endorsed on driving licence.]

Case(s) referred to:
R v. Guilfoyle [1973] 2 All ER 844 ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC ***(refd)***
Yahaya Mat & Anor v. Abdul Rahman Abu [1982] CLJ 68; [1982] CLJ (Rep) 363 FC ***(refd)***

Legislation referred to:
Road Transport Act 1987, ss. 41(1), 43(1)

For the appellant - Bernard Philip Lanat; M/s BP Lanat & Co
For the respondent - Hairul Najmi DPP, AG's Chambers

Reported by Gan Peng Chiang

JUDGMENT

Rhodzariah Bujang JC:

[1] The appellant was convicted and sentenced by the magistrate's court for an offence of "reckless and dangerous driving" under s. 41(1) of the Road Transport Act 1987 which had caused the death of one Apap ak Nguoh. The offence was alleged to have been committed on 7 January 2002 at about 8.10am at Mile 54, Kuching/Serian Road. He was sentenced to 30 months imprisonment and fined RM5,000 in default two months imprisonment. As required by the law, he was also disqualified from holding a driving licence (of any class) for three years from the date of the conviction which was 15 April 2009. The appellant's appeal is against both the conviction and sentence.

[2] In the appeal, the decision of the learned magistrate was attacked along these lines and I reproduced it in the order that they appeared in the appellant's counsel's written submission but in a summarized form.

(i) The prosecution's failure to tender the rough sketch plan rendered the neat sketch plan and its key (exh. P5 and exh. P5k, respectively) inadmissible.

(ii) The presence of scratch marks and scattered glass fragments were not sufficiently indicative of the point of impact.

(iii) Undue weight was given to the brake marks which were on the road shoulder.

(iv) Failure to give due weight to the victim's position in the middle of the road before the collision and the evidence of PW2 (Sjn Angat anak Dusi) that the point of impact was in the middle of the road.

(v) Failure to give proper and adequate consideration to the evidence adduced by the defence and giving reasons for rejecting the same.

(vi) Failure to distinguish between two categories of offences under s. 41(1) of the Road Transport Act ie causing death by reckless or dangerous driving.

[3] I will take the last point first.

Two Separate Categories Of Offence

I am in agreement with Mr. Bernard Philip for the appellant that indeed s. 41(1) provides for two separate offences but which attract the same punishment - one is dangerous driving and the other is reckless driving. I also agree with him that case law has decided that the ingredients of each differ from the other, though the distinction maybe fine but they are still obviously different as reckless driving is a more serious offence than dangerous driving. In this regard, I would adopt the definitions from case law which he has highlighted to me to show the distinction as aforesaid.

Reckless driving

to be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it. (per Vincent Ng J, in *Public Prosecutor v. Zulkifli bin Omar* [1998] 6 MLJ 65).

Dangerous driving

1. In a case of dangerous driving, the prosecution must establish that:

   (a) a situation created by the accused is dangerous, eg, turning right into the said road without stopping to give way to through traffic; and

   (b) when creating such situation the accused was at fault. Fault involves a failure; a falling below the care and skill of a competent and experienced driver in relation to the manner of driving and relevant circumstances (per Raja Azlan Shah)

(now HRH the Sultan of Perak) in *Ramiah v. Public Prosecutor* [1972] MLJ 258 at page 258 I right column to 259L left column. (per Low Hop Bing J (as he then was) in *PP v. Ong Kia Chan* [2006] 4 CLJ 334). (emphasis added).

[4] The appellant submitted that by failing to appreciate the principle of law governing the offence reckless or dangerous driving, the Honourable magistrate had misdirected himself as to whether the evidence in the present case was sufficient support the finding of either dangerous driving or the more serious category of reckless driving.

[5] The learned magistrate himself had relied on a quotation of Lawton J in *R v. Guilfoyle* [1973] 2 All ER 844 which makes the same distinction. This quotation was lifted from the decision of Vincent J, in *Zulkifli*'s case *(supra)* and in view of the importance of this point to my judgment I would like to also reproduce the same below.

... cases of this kind (causing death by dangerous or reckless driving) fall into two broad categories; first, those in which the accident had arisen through momentary inattention or misjudgment (hereafter called 'the first category'), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness (hereinafter called 'second category').

...

... to be guilty of the more serious category of the offence of reckless driving, the driver (Defendant) must have created an obvious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to take it.

[6] The prosecution in this case has committed a fatal error in lumping the two offences together which error is inexcusable and prejudicial to the accused in that he had been unfairly burdened with disproving two separate ingredients of the offence. The learned magistrate could not be faulted wholly for this mistake as the prosecution themselves in drafting the charge should have been alive to the fact that under s. 41(1) there are infact two separate offences. On this score alone, I am prepared to allow the appeal and set aside the appellant's conviction and sentence under the original charge but before doing so, and to be fair to the prosecution, I would still consider the other points raised by Mr. Bernard Philip.

The Absence Of The Rough Sketch Plan

[7] I do not agree with his submission that the neat sketch plan is secondary evidence. It is a primary evidence in its own right although it was based on a rough sketch plan because the witness who produced the documentary evidence was its maker and he testified on its production in court. (see the evidence of PW6 (Chief Inspector John Sabadurai ak Frankie Alat) at p. 27 and p. 29 of the Appeal Record). The absence of the rough sketch plan merely goes to the weight of the document tendered and not it's admissibility. If his evidence on the content of the neat sketch plan is shaken in cross-examination or contradicted by other evidence, then the neat sketch plan would be rendered quite useless but in this case no such evidence emerged. Although he was cross-examined on it, the cross examination did not have the shattering impact on the credibility of the witness with respect to this part of his testimony for the defence counsel merely put to him that the positions of the scratch mark, pieces of glasses and vehicles in the sketch plan were wrong.

Position Of Scratch Marks And Scattered Glasses And Brake Marks On The Road Shoulder

[8] In any accident case, the presence of the above are good indications of the point of impact, in the absence of any logical and reasonable explanation for their presence or positions on the road. The scattered glasses may in some cases been proved to have been moved and flung by the force of the collision but there must be evidence to induce the learned magistrate to depart from what really is an entrenched legal principle. (see for instance the Federal Court's case of *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151 - as the importance of scratch marks on the road and the Federal Court's case of *Yahaya Mat & Anor v. Abdul Rahman Abu* [1982] CLJ 68; [1982] CLJ (Rep) 363 on the importance of shattered glasses on the road) I must stress however that whilst the position of these glasses and brake marks are indicative of the point of impact, it is not in itself proof beyond reasonable doubt of the same and evidence which contradicts the indication is still permissible under the law.

[9] In this case, there is no evidence to disbelieve PW6, the investigating officer of the case who went to the scene half an hour after the accident and who drew the sketch plan showing the brake marks and the glass fragments on the victim's right of way. As for

the brake marks on the road shoulder, it is definitely made by the appellant's lorry for when PW6 went to the scene, the lorry was still there and I really failed to understand the counsel's complaint that the learned magistrate attached too much importance to the brake marks and without appreciating that the ground was soft at the road shoulder. Soft or not, there cannot be any dispute that the lorry made the marks as the ground and 18 meters is quite a distance to travel before the lorry stopped. Reading his judgment, I did not see him attaching too much weight or giving too great an importance on the presence of the brake marks on the road shoulder. I see no reason also to depart from his finding of fact based on the scratch works and the scattered glasses that the accident happened on the victim's right of way.

The Victim's Position In The Middle Of The road

[10] It is not disputed that the victim was in the middle of the road. He intended to make a turn to the school which is on his right. The lines dividing the two lanes of the road was a broken one and he has not committed any error of law or judgment by positioning himself there before making the turn so his position cannot be a subject of adverse comment by the defence.

The Appellant's Defence

[11] His defence is actually condensed in one line ie that the victim came from behind a van and then the collision happened. I agree however, that the learned magistrate did not even mention let alone make a specific finding that he disbelieved him although it can be inferred from the conviction that he did.

[12] However, the fact that he did not do so - given that it is a one line defence and in the light of the sketch plan, the evidence of the eye-witness to the accident (the victim's own son) and particularly in view of the sheer illogicality of that defence, his failure to do so is not fatal. I say illogical, because it is beyond comprehension that the victim would be so suicidal as to overtake a van and then turned right into the van's path of travel to make that turning to the right.

[13] Therefore, although the learned magistrate did not mention that he did not believe the defence story, the sheer improbability of it on the face of the evidence itself and the clear evidence of the sketch plan which shows where the point of impact was, means his failure is not prejudicial to the appellant.

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The Final Decision

[14] Although I have earlier agreed that the charge was bad for duplicity and to allow the appeal by reason of it, nevertheless I find overwhelming evidence to show the offence of driving without due care and attention as it is obvious that the appellant had failed to take heed of the presence of the victim on the road. Thus, in the exercise of my revisionary powers, I enter a conviction for careless driving under s. 43(1) of the Road Transport Act and sentenced the appellant to RM10,000 fine in default six months imprisonment. I also order that this conviction be endorsed on his driving licence.

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